Presentation made by the Secretary-General of AALCO on
"The Asian-African Perspectives on the International Criminal Court"
Seminar on Historical Origins of International Criminal Law
(Session 1, Saturday, 29 November 2014)

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Distinguished Participants, Ladies and Gentlemen,

At the outset, I thank the organizers of this important event for inviting me to deliver this lecture on the topic: "*The Asian-African perspectives on the International Criminal Court"*. This is a topic on which the Asian-African Legal Consultative Organization has expended a great deal of energy. AALCO, as a regional inter-governmental organization, has been considering issues relating to the International Criminal Court for more than two decades now. At present, we work as a platform for exchange of ideas on the important institutional and legal developments at the ICC. It is hence, my pleasure to share with you what the Asian-African countries think about the ICC.

1. *Introduction: Importance of ICC*

Since the history leading up to the creation of the ICC is well-known, I am not going to recollect it except to mention few points. International Courts and Tribunals are indeed a recent development, something that appeared on the horizon after the Second World War. For close to five decades from Nuremberg, we saw inaction. The turbulent events in Europe and Africa in the 1990s once again prompted us to turn to international

criminal courts for delivering justice. Indeed, it is our collective memory of the horrors of mass crimes that fueled our desire and momentum to establish a permanent international court for trial of humanity's worst criminals.

And yet though there were commonalities in aims and intentions, fashioning a permanent international court, that in principle had jurisdiction over all of humanity was no easy task. As I will be telling you, there were a large number of concerns, particularly that smaller and less powerful actors in the international scenario had with the structure of the court. I will recall here what those concerns were. This is quite relevant for us, because we need to examine how far were these concerns resolved and to what extent the fears were correct (or incorrect). The answer to that question will provide us some explanations for the current attitudes of the Asian and African states to the ICC.

2. *Position of Asian –African States Leading up to and after the Adoption of Rome Statute*

Since it is impossible to portray all the positions of Asian-African States in relation to issues covering a wide variety of matters of ICC, what I would like to do is to highlight the five major concerns of the Asian-African States expressed during the negotiation process. It also needs to be underlined here that the concerns of the Asian-African States that had been expressed prior to and during the process leading up to the adoption of Rome Statute remain valid even after the coming into force of the ICC. On certain issues the concerns have come to acquire specific manifestations.

(i) Powers of the Security Council

The relationship between ICC and the United Nations Security Council was a matter of great concern at the Rome. As is well-known, under the Rome Statute the UNSC may refer a matter to the Prosecutor of ICC, even if the situation is not taking place on the territory of a State Party. That is, ***non-parties*** may be made subject to the

jurisdiction of the ICC notwithstanding that the Court itself is a treaty-based institution and therefore ought not to apply to any non-party (technically speaking).

In regard to the power of the UNSC to initiate action, countries had serious reservations at Rome. Several States from the NAM opposed any role for the Security Council. For example, ***India*** expressed concern over the possibility that this power could be extended and exercised even against States who are not signatories to the Rome statute thus violating a long standing fundamental principle of international law as laid down in the Vienna Convention on the Law of Treaties. In so doing, it was argued that this move blurred the distinction between customary and treaty based international law.

Furthermore, in principle, it was questioned how those non-party states, especially from among the permanent members of the Council (**USA, China and Russia**), can justify their exceptionalism, namely of subjecting to the Court another state not party while they do not accept the Court's jurisdiction over themselves.

Similarly, the ability of the Security Council to defer ICC proceedings was another one of the most controversial provisions of the Statute and something that was strongly opposed by many States. As is known, Article 16 of the Rome Statute provides that the UN Security Council may, in a resolution adopted under Chapter VII of the Charter, request the Court to defer (namely not commence or proceed with) an investigation or prosecution for a renewable period of twelve months. As such it recognizes the ability of the Security Council to suspend the activities with regard to a specific situation or case, when it is considered that the suspension is necessary for the maintenance of international peace and security. It was argued that a political body such as Security Council should not be given the power to interfere with the working of a legal institution such as the ICC.

However, in the final version, states could not stop the UNSC from being given the right to trigger the jurisdiction of ICC. But as a kind of compromise, it was added (in Article 16) that it is subject to a renewable period of 12 months. This constituted a

compromise between those States which in the negotiation process were in favour of a total independence of the Court from the Council, and those advocating an international criminal court subordinated to the Security Council.

(ii) Powers of the Prosecutor

An issue of critical importance at Rome was of the powers of the Prosecutor exercisable in accordance with the Rome Statute. As is well known, the chief prosecutor of ICC can initiate an investigation on the basis of a *referral from any state* which is party to the ICC, or from the *UNSC acting under Chapter VII* of the Charter of the United Nations. In addition, the prosecutor can initiate investigations *proprio motu*, (the most controversial part of his powers) on the basis of information received from individuals or organizations about crimes within the jurisdiction of the Court. This had raised a lot of criticisms primarily on the ground that it could become a political tool for intervention into the internal affairs of states.

For instance, **China** expressly disagreed with the power given the Prosecutor to initiate investigation or to prosecute *proprio motu*, which it considered to be exercisable "without checks and balances against frivolous prosecution", thus amounting to "the right to judge and rule on State conduct".

(iii) Principle of Complementarity

To maintain and preserve national criminal jurisdiction was a principal concern of many states at the Conference. Hence, one of the foundational principles of Rome Statute, namely the principle of complementarity (which means that the Court will supplement but not supersede national jurisdictions) was a hotly debated issue. The basic idea behind the complementarity is to maintain State sovereignty, under which ''it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'', to enhance the national jurisdiction over the core crimes prohibited in the Statute, and to perfect a national legal system so as to meet the needs of

investigating and prosecuting persons who committed the international crimes listed in the Statute.

Many countries had expressed the view that the principle of complementarity would be in keeping with the principle of sovereignty. For example, **China** deemed the principle of complementarity as "the most important guiding principle of the Statute", which should be "fully reflected in all its substantive provisions and in the work of the Court, which should be able to exercise jurisdiction only with the consent of the countries concerned".

The difficult aspect of the negotiations was to develop the criteria setting out the circumstances when the Court should assume jurisdiction even where national investigations or prosecutions had occurred. Two broad concepts emerged: Unwillingness and Inability.

As provided in Article 17 of the Rome Statute, where national criminal jurisdictions are unwilling or unable genuinely to carry out investigations and prosecutions of the most serious crimes of international concern, the ICC will instead investigate and prosecute those allegations. But this formulation left several questions unanswered (particularly with regard to the terms "unwilling and unable") as to the meaning, scope and extent of control to be exercised by the international judges over domestic proceedings.

(iv) Universality Vs State Sovereignty

One of the main reasons cited by almost all those who opposed the treaty was that, the ICC went against the concept of national sovereignty. This is hardly surprising as the project of an ICC as such meant that States would have to accept a certain limitation of one of the most sacred areas of State sovereignty: *criminal jurisdiction*. But, each

country had its own understanding and definition of sovereignty based on its interests. There were States which (in spite of their declared support for the project) only wanted a symbolic or limited jurisdictional competence of the future ICC. To this group belonged **India, Indonesia, Mexico** and also **Japan**. Two of them (**India and Mexico**) were quite vocal among them and were hostile with regard to potential SC control over ICC. This was in clear contrast to the position of P-5 which wanted a central role to be given to UNSC both in referring matters to ICC and filtering or blocking cases going to it. The Group called LMG, which consisted of 55 States from Africa, Western Europe and Latin America, preferred a jurisdictional regime based on some form of universal jurisdiction meaning that a state party of the future ICC obtaining custody over a person responsible for core crimes would enable the court to exercise jurisdiction over that person regardless of his nationality or the place of the crime.

States also had differing views about whether the Court should be able to exercise jurisdiction over the nationals of states that were not parties to the Rome Statute. There was a proposal floated by the **Republic of Korea** that enjoyed wide support. It allowed the ICC to exercise jurisdiction over the nationals of states not party to the court as long as one of the following states with a connection to the crime had ratified the Statute:

The territorial state, the custodial state, the state of the nationality of the accused or the victim. This was ultimately rejected on the criticism that it provided for near-universal jurisdiction.

At the end of the Conference, States voted to allow ICC jurisdiction over nationals of non-state parties as long as either the territorial state or the state of the nationality of the accused joined the Court. Therefore, outside of situations referred by the Security Council, the ICC only has jurisdiction over offences committed when a State that has nationality or territorial jurisdiction over the offence is a State party to the Rome Statute.

(v) Crime of Aggression

The issue of the crime of aggression was one of the central points of contention during the Rome Conference and during the preparatory process in the Ad Hoc Committee and the Preparatory Committee. The problem was compounded by the fact that the 1996 ILC Draft Code of Crimes did not include the crucial definition of the State act of aggression, contrary to the Draft Code it adopted on first reading in 1991.

At about the middle of the Conference there was increasing support for the crime of aggression to be included despite the knowledge that no agreement could be reached at the conference either on its definition or on the role of the Security Council. The P-5 took the position that they could agree on the inclusion of the crime of aggression only if the proper role of the UNSC in accordance with the Charter was recognized. Many other states distinguished between the definition of aggression for the ICC and the competence of the SC to determine whether an act was aggression. The NAM strongly supported the inclusion of the crime though there were disagreements as to the definition within itself.

On the politically more controversial question of the role of the Security Council, there was intense disagreement. Some countries, led by the five permanent members of the U.N. Security Council (**China, France, Russian Federation, United Kingdom, and United States**), supported an activation provision that reserved jurisdiction determinations to the Security Council alone. The majority of States Parties, most of which at any given time are not members of the Security Council, opposed a so-called "Security Council trigger" for ICC aggression cases. These countries include many of the non-aligned movement (NAM) group of countries, and developing countries generally, including many African nations.

The delegations of **Azerbaijan** and **Greece** then paved the way for a compromise by suggesting that the crime should be included in Article 5 without a definition and without entering into force, and that the future Preparatory Commission should be mandated to formulate such provisions for consideration and action by the Review

Conference. The NAM delegations submitted this approach as a formal proposal which was accepted.

What is interesting for us is that the principal opposition to the Rome statute (from countries that have not adopted it) is still along these lines. It is indeed unfortunate that three out of the five permanent members of the Security Council even to this date remains non-committal to being a part of the ICC. A good number of States, hence, still point this out as a legitimate reason not to join the court.

Be it the scope of powers of the Security Council or the prosecutor, the issue seems to be that many prominent actors of the international community have not been convinced that there are adequate checks and balances, or shall I say, im balance in the distribution of power. I am wondering how, unless we solve this fundamental issue, we can get universal acceptance for the Rome Statute.

3. *General concerns of AALCO Member States out of the Relevant Meetings*

To identify and address the concerns of Asian-African States after the coming into force of the ICC, the AALCO had convened a series of Seminars and Work Shops on specific thematic concerns relating to the ICC. For three consecutive years in 2009, 2010 (pre-Review Conference) and 2011 (Post Review Conference) in collaboration with the Governments of Japan, Malaysia and the ICC Secretariat, we convened three Expert Group Meetings on various issues and challenges facing the ICC in New Delhi and Putrajaya.

In crux the inference from these meetings was that the Member States were concerned primarily with the following : (i) the relationship between the ICC and the UN Security Council; (ii) the principle of complementarity in light of the post ICC Review Conference developments; (iii) Bilateral Immunity Agreements; (iv) the reluctance of Asian states to ratify the Rome Statute; (v) the immunity of Heads of States; (vi) the importance of strengthening the domestic legal institutions of both parties and

non-parties to the Rome Statute; (vii) domestication of the provisions of the Rome Statute into the domestic legislations (viii) *Proprio motu* powers of the Prosecutor and (ix) imparting proper training to Prosecutors and Judges (State parties and non-State-Parties) about the provisions of the Rome Statute; x) the exclusive focus of ICC's prosecutorial interventions in one continent while numerous alleged violations occur elsewhere.

Many AALCO Member States and larger countries have not joined as States Parties to the ICC so far. AALCO Member states both parties and non-parties to the ICC statute have expressed their views as to why many states still remain outside the Rome Statute. Some of the reasons include:

- Some believe that the essential elements of criminal law or criminal due process are missing in the design of the ICC;
- Some States seem to believe the ICC undermines the sovereign right to exercise jurisdiction over their own nationals (**Republic of Korea, 2004**). The idea of subjecting its own citizen to undergo international trial may not be that attractive.
- The other reason concerns regarding the definition of "the most serious crimes of international concern", namely, crimes of genocide, crimes against humanity and war crimes, adopted in the Statute, was far broader than those recognized in customary international law. This vague and broad definition, were believed to give the Court an unfettered ability to decide when an alleged crime was within the jurisdiction of the Court. Further, wide definition of "crimes against humanity" might be against some of their domestic laws, in particular, the preventive laws which were intended to safeguard national security and public interest (**Malaysia, 2003**).

Another stream of thought within the AALCO Member States is that it considers the establishment of the ICC as a result of consensus only among some States. One of the Member States wished for a Declaration to be adopted by the AALCO stating that the ICC did not have any jurisdiction over the non-ratifying Parties, and it should not

intervene in the internal matters of any such State (Malaysia 2007, 2009). Another State had questioned the actions of the ICC regarding the issue of warrants of arrest against alleged war criminals of a non-State Party to the Rome Statute.

3) Immunity of Heads of States

The issue of States with constitutional monarchies or presidential immunities, facing difficulty accepting the Rome Statute has become a hot issue currently. It is good to remind ourselves here that according to Article 27 of the Rome Statute it applies equally to all persons without distinction based on their official capacity. Hence it removes immunities which would ordinarily be available to State officials. This has raised some serious concerns. For example, many delegates of AALCO have noted that their countries were not a Party to the Rome Statute for both legal and political reasons, the primary one being the sovereignty of the nation.

In this regard, an important development that has taken place recently is that the Assembly of the AU at its 23rd Summit which was held from 26-27th of June, 2014, adopted a protocol to amend the protocol on the Statute of the African Court of Justice and Human Rights ("ACJPR Amendment). The amendment protocol confers on the proposed ACJHR, international criminal jurisdiction over crimes of genocide, war crimes, crimes against humanity which also fall under the jurisdiction of the ICC and other 11 crimes.

More importantly, a controversy has centered on the "immunity provision under article 46A bis which provides immunity to serving AU heads of states or governments and senior state officials. The conformity of this immunity provision with that of article 27 of the ICC statute to which the majority of African states are members, has attracted huge debate. One finds thus a clear contradiction between Article 46Abis of the African Court and article 27 of the ICC statute. What the ICC statute has removed, the amendment protocol has protected.

In addition, the Summit Meeting of Assembly of Heads of States and Government (12 October 2013) reiterated its opposition to a number of prosecutions at the International Criminal Court (ICC). It has called on the UN Security Council to act under Article 16 of the Rome Statute and defer proceedings against the President of one country. It has also decided that African States should not comply with the ICC with regard to that particular case, including a call for non-compliance with the arrest warrant for that President. In addition, the AU has also called on the UN Security Council to defer the investigations and prosecutions in the Kenya situation. This development shows the disappointment of the African States towards the functioning of the ICC. However, it has to be carefully balanced with the very fundamental principle for which the ICC was established i.e. to end the culture of impunity and ensure accountability for the most serious crimes.

2.) Final Remarks

That ICC has been created to achieve a noble objective can hardly be exaggerated. The ICC is all about prosecuting and punishing people who kill fellow beings. That there is an institution devoted just to do that augurs well for the future of humanity. In this general sense, it appears that the establishment of the ICC has been hailed by the comity of nations by and large. However, a large number of important international actors have refused to join the Court for reasons that are closely connected to lack of adequate mechanisms to ensure checks and balances on the exercise of its power. At present 122 States are Parties to the Rome Statute and till date 21 cases and 9 situations have been brought before the International Criminal Court. Despite its global mandate, however, all prosecution cases in its young history have come from Africa. The silence of the Court, as a matter of fact on the territory of some State-parties needs explanation; this is a popular voice in the AALCO forum till today. There are some grave violations in other territories which the ICC chooses to remain silent. Due to this and other reasons, to be discussed next, the participation of AALCO Member States in the ICC is still lackluster –

today, among 47 Member States, only 17[1] have joined the Rome Statute. While there are a good number of critics of this line of reasoning (many of them that merit applause too), we need to remember here a common law doctrine that courts from the common law tradition often repeat : that justice must not only be done, but it must also seen to have been done.

The other major challenge before the ICC is related to its character as an organization that is the issue of universality, sustainability and complementarity. In order to achieve the universality of membership of the Rome Statute, it should be recognized that each country has its own legal culture and position on the ratification of the Statute, which has different political implications on the home front of each State. Therefore, sustainable efforts should be taken on the part of international community to iron out the differences, misconceptions revolving around the Rome Statute of the ICC and thereby accommodate the viewpoints of the non-States parties, which have been reflected in this presentation and at many other fora, including the relevant AALCO Member States into the system to attain the universality of the international criminal justice system.

The above mentioned concerns of the States shed light over their individual and collective concerns, and though repeated calls for universalization have been made by the Secretary-General of the United Nations, ultimately ratifying the Rome Statute depends on the sovereign decision of the States. The focus should now be upon ensuring the credibility of the ICC so that it attains the realm of universality.

Thank you.

[1] As updated on the ICC website in 2013